SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 1014 81

DULUTH, MISSABE AND IRON RANGE RAILWAY COMPANY, A CORPORATION,

Petitioner,

vs.

THOMAS HENRY ROSS, BY ADA ROSS, GENERAL GUARDIAN.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA AND BRIEF IN SUPPORT THEREOF.

CLARENCE J. HARTLEY,
DENNIS F. DONOVAN,
Counsel for Petitioner.

ELMER F. BLU,
Of Counsel.

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PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully shows that it seeks herein a review by this Court of the final judgment of the Supreme Court of Minnesota, the Court of last resort of that State, affirming an order of the District Court of the Eleventh Judicial District, St. Louis County, Minnesota, reducing a verdict of the jury from $18,500 to $15,000, in respondent's action under the Federal Employers' Liability Act (35 Stat. 65, 45 U. S. C. A. 92) to recover damages for injuries sustained while employed by petitioner as a switchman in interstate commerce and attributed to a violation of the

Federal Safety Appliance Act (27 Stat. 531, 45 U. S. C. A. 15).

Summary Statement of the Matter Involved.

On June 30, 1936, respondent was a member of a switch crew sorting, selecting and classifying cars to be used in interstate commerce. Cars were being switched and shunted on different tracks for this purpose. Two of such cars in charge of respondent were uncoupled and shunted, but did not clear the "frog" due to an unintended application of air brakes. The foreman signaled the engineer to back the train against the two cars and without stopping continue until the entire train was in the clear. In executing the movement the train was slowly and cautiously moved against the two cars, resulting in a light and easy contacting of the cars. When the train stopped the two cars continued on with respondent thereon and during the process of stepping off his mackinaw jacket caught and jerked in such a manner as to tear a piece therefrom about a square foot in size and he fell. Within a matter of seconds respondent was on his feet again and took charge of the next train movement consisting of the pulling of the train of cars above the switch and dropping them on an adjoining track. He lost no time on account of the accident. On August 10, 1936, while partaking of dinner in his home, he fainted. On August 11, 1936, he was working on cars eighty feet above St. Louis Bay, and that night had another spell. Attended by the family physician he was hospitalized and his condition diagnosed as a stroke due to a blood clot in the brain arising out of profuse gastric hemorrhaging. Seven months after the accident he was declared insane, committed to a State hospital and he attributes his disability to the fall. Petitioner contends the disability is solely due to disease.

Respondent relies upon two causes of action arising out of employment "in interstate commerce". The first alleged

a "violation of the Federal Safety Appliance Law". The second is an action at common law.

Reasons Relied On for the Allowance of the Writ.

The Supreme Court of Minnesota has decided a Federal question of substance in a way not in accord with applicable decisions of this Court, and in that connection error is assigned on questions and reasons presented for the allowance of the writ as follows:

(1) The basis of the first cause of action is a slow train movement against two cars standing alone on a two per cent grade without brakes applied and with such lack of force when contact was made as not to effect a coupling, resulting in the Court's denying petitioner its defenses of contributory negligence and assumption of risk.

(2) The Court permitted the jury to speculate, in choosing between accident attributed to a violation of the Federal Safety Appliance Act and disease, on the question of proximate cause.

(3) The Court, over petitioner's objections, permitted introduction of incompetent and prejudicial evidence showing sickness, poor health and hospitalization of respondent's wife and her inability to do housework, all of which directly appealed to the sympathy of the jury in such a way as to beget a wholly wrong verdict and pervert the applicable Federal Acts.

(4) Allowing judgment to be entered on a verdict corrupted by appeal to sympathy, passion and prejudice and contrary to the principle that judgment may not be based on a verdict thus tainted.

WHEREFORE petitioner, referring to the attached brief in support of its reasons for review, respectfully prays that

this Court issue a writ of certiorari directed to the Supreme Court of Minnesota to certify and send to this Court a full and complete transcript of the record herein, to the end that the case may be reviewed and determined by this Court as provided by law, and that the decision of the Supreme Court of Minnesota may be reversed, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

And your petitioner will ever pray, etc.

DULUTH, MISSABE AND IRON RANGE
RAILWAY COMPANY,
By CLARENCE J. HARTLEY,
DENNIS F. DONOVAN,
Counsel for Petitioner.

ELMER F. BLU,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINIONS OF THE COURT BELOW.

There are two opinions of the Minnesota Supreme Court in the present case. The first, filed on February 16, 1940, and reproduced at R. 1397, *et seq.* affirmed the order of the trial Court denying petitioner's motion in the alternative for judgment or a new trial. This opinion (not yet officially reported) may be found in 290 North Western Reporter at p. 566. The second opinion, filed on April 23, 1940, affirmed the judgment of the trial Court entered pursuant to the first opinion of the Minnesota Supreme Court "for the reasons given in the previous opinion and upon authority of that opinion". The second opinion (not yet officially reported) may be found in 291 North Western Reporter at p. 610, and is reproduced herein at R. 1426.

II.

JURISDICTION.

The judgment to be reviewed was filed in the Supreme Court of Minnesota on April 29, 1940 (R. 1429).

The jurisdiction of this Court is invoked pursuant to Section 237 of the Judicial Code of the United States as amended by the Act of February 13, 1925, Chapter 229 (43 Stat. 937, 28 U. S. C. A. 205) and on the basis of the following specific claims advanced and rulings made in the lower courts:

(1) The basis of the first cause of action is a slow train movement against two cars standing alone on a two per cent

grade without brakes applied and with such lack of force when contact was made as not to effect a coupling, resulting in the court's denying petitioner its defenses of contributory negligence and assumption of risk (R. 28, 36-52, 69, 93-96, 144-148, 663-668).

Petitioner requested a charge that it did "not guarantee or insure the safety of its employes * * *. Under the evidence of this case, the so-called doctrine of assumption of risk should be applied here". The trial court denied those requests (R. 1303) and charged the jury that if the "defendant was negligent by reason of non-compliance with the Act of Congress which I have read, the defenses of contributory negligence and assumption of risk are not available to the defendant" (R. 1310, 1311). Petitioner requested a charge that "if under the evidence there was a safe and a dangerous way to do the work or thing the plaintiff was in the act of doing at the time of the accident, and * * * the plaintiff chose the dangerous way * * *, he assumed the risk * * *." The trial court denied this request (R. 1305) and instructed the jury that "where the employe is charged with the duty of protecting life or property in case of an accident or emergency, he may be justified in taking chances in the performance of that duty which he would not be justified in taking if no such duty were imposed upon him. Under such circumstances he is not charged with having assumed the risk of injury * * *" (R. 1316, 1317). Petitioner excepted to the court's rulings (R. 1323, 1324) and assigned error as to all of them in the Supreme Court of Minnesota (R. 1370, 1371). That court affirmed, saying: "Other assignments of error * * * have either been disposed of by the prior appeal or require no discussion" (R. 1406).

(2) The court permitted the jury to speculate in choosing between accident attributed to violation of the Federal

Safety Appliance Act and disease on the question of proximate cause (R. 1313).

Opposed to the scintilla of evidence supporting respondent's claim that a violation of the Federal Safety Appliance Act was the proximate cause of his disability is the undenied presence of high blood pressure (R. 389-392, 626), disease of a "hypertensive type" (R. 628, 1030, 1140, 1191), arteriosclerosis and arteriosclerotic psychosis (R. 332-335, 822), and profuse gastric hemorrhaging (R. 227, 228, 244-250) causing so sluggish a circulation as to precipitate a thrombosis in the brain resulting in a stroke and psychosis (R. 817-825, 829, 830, 1026).

(3) The court, over petitioner's objections, permitted introduction of incompetent and prejudicial evidence showing sickness, poor health and hospitalization of respondent's wife and her inability to do housework, all of which directly appealed to the sympathy of the jury in such a way as to beget a wholly wrong verdict and pervert the applicable Federal Acts (R. 237, 238, 256-260).

Over petitioner's objection that questions pertaining to family responsibilities were "incompetent", the trial court permitted questions and answers as follows:

> "Q. At the time that this hearing was had was your mother then able to be about to look after it?
>
> A. No; she was in the hospital" (R. 237). "* * * No; my mother was in the hospital at the time" (R. 238).
>
> "Q. Were you in good health then?
>
> A. No, I wasn't" (R. 256).
>
> "Q. I see. And were you able at that time to get his meals and to do your own housework?
>
> A. No, I wasn't" (R. 257).
>
> "Q. Why was that?
>
> A. Why, I had been sick.
>
> Q. Yes, and were you feeling well at that time?
>
> A. No, I wasn't" (R. 258).

The rulings of the trial court were excepted to (R. 34) and error assigned thereon in the Supreme Court of Minnesota (R. 1357-1360). The latter court affirmed said assignments as requiring "no discussion" (R. 1406).

(4) Allowing judgment to be entered on a verdict corrupted by appeal to sympathy, passion and prejudice and contrary to the principle that judgment may not be based on a verdict thus tainted.

Misconduct of respondent's counsel attributed to improper and prejudicial argument was duly excepted to before the trial court charged the jury (R. 1293, 1294). Petitioner moved the trial court for a new trial on the ground, among others, that counsel's argument directly appealed to the passion and prejudice of the jury in such a way as to deprive petitioner of a fair trial and result in the return of a verdict that was excessive (R. 1330, 1376-1382). The District Court denied that motion (R. 1130, 1331, 1382, 1383). The refusal of the court to vacate the tainted verdict and grant petitioner a new trial was assigned as error on appeal to the Minnesota Supreme Court (R. 1376-1382). The Minnesota Supreme Court declared that "while the argument of plaintiff's counsel was at all times vigorous *and, as was conceded upon oral argument, was sometimes beyond the issues of the case,* we do not think that it so exceeded the permissible limits as to justify granting another trial" (R. 1406). (Italics ours.) Petitioner appealed from the judgment entered upon the reduced and tainted verdict to the Supreme Court of Minnesota. Judgment below was affirmed by final judgment of the Minnesota Supreme Court (R. 1429).

Cases believed to sustain the jurisdiction of this Court are:

St. Louis, I. M. & S. Ry. Co. v. *McWhirter,* 229 U. S. 265, 57 L. Ed. 1179;

Seaboard Air Line v. *Horton,* 233 U. S. 492, 58 L. Ed. 1062;
C. M. & St. P. Ry. Co. v. *Coogan,* 271 U. S. 472, 70 L. Ed. 1041;
N. Y. C. Ry. Co. v. *Johnson,* 279 U. S. 310, 73 L. Ed. 706;
M. St. P. & S. S. M. Ry. Co. v. *Moquin,* 283 U. S. 520, 75 L. Ed. 1243;
C. G. W. R. R. Co. v. *Rambo,* 298 U. S. 99, 80 L. Ed. 1066.

III.

STATEMENT OF THE CASE.

On June 30, 1936, respondent was employed as a switchman, sorting and selecting cars to be used in interstate commerce (R. 3, 4, 36, 37, 42, 43, 1308-1314). Cars were being switched and shunted on different tracks on a two per cent grade. The first car was stopped by hand brake at the desired point. The next two cars were shunted upon an adjoining track where they would be assembled into a train (R. 28, 36-52, 92-96, 144-147, 151, 155, 435, 663-668). Due to an unintended application of air brakes these two cars "stopped on the frog". After bleeding the air the foreman signaled the engineer to back the train in a down-hill movement against the cars standing without brakes applied and until the entire train was in the clear, so as to permit the passing of another train that would be along in about ten minutes (R. 49, 57, 435-439, 744). In executing this movement the train was slowly and cautiously moved, resulting in a very light contact and a continuous movement until the train stopped in the clear, at which time the two end cars with respondent on them were observed continuing on (R. 49, 51, 69, 93-96, 444, 648). In the process of stepping off the car upon which he was riding respondent's mackinaw jacket became caught and jerked in such a way as to tear

a piece therefrom about a square foot in size, and he fell (R. 90, 91, 103, 107, 127, 128, 137-140, 445, 648). Over petitioner's objection respondent testified that he had become unconscious (R. 289-292) but such loss of consciousness was denied by respondent to his family physician when attended for the stroke in August, 1936 (R. 828, 853).

Within a matter of seconds respondent without assistance arose to his feet and took charge of dropping the entire train of cars upon petitioner's main line (R. 91, 298).

Respondent continued at work without loss of time until August 11, 1936 (R. 91, 244, 247, 295, 298-301, 651, 652, 653). While in his home on August 10 and 11, 1936, he had two fainting spells attributed to profuse gastric hemorrhaging (R. 244-250). The family physician was called, he was hospitalized for a month, and his condition diagnosed as a stroke attributed to a thrombosis arising out of profuse gastric hemorrhaging and sluggish circulation (R. 227, 228, 248-252, 817-825, 829, 830). On October 4 and 8, 1936, respondent was thoroughly examined by another doctor of his own choosing who said "there was nothing unusual about his actions or demeanor that suggested a psychosis" (R. 387, 391, 392). On February 8, 1937, he was declared insane and committed to a State Hospital (R. 232, 574, 825). "High blood pressure" and "a slight stroke" were here confirmed by the asylum staff (R. 626) and his condition diagnosed as "arteriosclerotic psychosis" (R. 628).

Respondent admits the presence of arteriosclerosis (R. 332, 333, 390, 391, 1170-1173, 1180). He admits the profuse gastric hemorrhaging (R. 244-251). When questioned by his attending physician he denied that he had been rendered unconscious by the fall (R. 828, 853). Loss of consciousness by accident was necessary to establish traumatic insanity (R. 1115, 1116).

Evidence was adduced in this case to the effect that "in making that movement it wasn't necessary to couple onto

the cars. * * * That is what they were doing in the first place, was trying to put them down that track'' (R. 147, 151) but opposed to the last quoted testimony of a fellow switchman he creates a paradox by introducing evidence of contrary railroad practice elsewhere. Upon such contradicted practice respondent relies for the suggested negligence in his common law case (R. 149-157, 515-518). Respondent claims that petitioner's negligence was the cause of his insanity (R. 411, 412).

IV.

SPECIFICATION OF ERRORS INTENDED TO BE URGED.

1. Error in excluding petitioner's defenses of contributory negligence and assumption of risk.

2. Error in entering judgment based on a scintilla of evidence.

3. Error in the admission of testimony showing family responsibilities such as the sickness, poor health, disability and hospitalization of respondent's wife.

4. Error in allowing judgment against petitioner to be based on a verdict arrived at by appeal to sympathy and corrupted by passion and prejudice.

V.

ARGUMENT.

Point A: This Court has jurisdiction.

Respondent pleads interstate commerce and a violation of the Federal Safety Appliance Act. That the parties were engaged in interstate commerce is admitted. A violation of the applicable Federal Acts is denied.

The Acts of Congress relied on by respondent read as follows:

The Federal Safety Appliance Act, (27 Stat. 531, 45 U. S. C. A. 15):

> "§ 2. *Automatic couplers.* It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

The Federal Employers' Liability Act (35 Stat. 65, 45 U. S. C. A. 92, 379, 434):

> "§ 51. * * * Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or betwen the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect, or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."
>
> "§ 53. * * * Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."
>
> "§ 54. * * * such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

The pleadings, evidence and charge of the Court are based on a controversy of a purely Federal character.

In this respect the case is identical to *St. Louis, I. M. & S. Ry. Co.* v. *McWhirter,* 229 U. S. 265, 57 L. Ed. 1179, where this Court said: "As we have seen, the pleadings in express terms exclusively based the right to relief upon the statutes of the United States, and no non-Federal ground was either presented below or passed upon. * * * While it is true, as we have said, that, coming from a State court, the power to review is controlled by Rev. Stat. § 709, *yet where, in a controversy of a purely Federal character, the claim is made and denied that there was no evidence tending to show liability under the Federal law, such ruling, when duly excepted to, is reviewable, because inherently involving the operation and effect of the Federal law.*" (Italics ours.)

Point B: The Supreme Court of Minnesota has decided a Federal question of substance in a way not in accord with applicable decisions of this Court.

1. *It was error to exclude petitioner's defenses of contributory negligence and assumption of risk for the reason that evidence preponderated against the claimed violation of the Federal Safety Appliance Act.*

Throughout, petitioner nas contended, that there is no causal connection between respondent's disability and the alleged negligence of petitioner under the Federal Acts referred to.

Special consideration of the facts will disclose testimony in respondent's case emphasizing that it was not necessary to effect a coupling in the work being done, and in doing the thing here claimed to violate the Federal Safety Appliance Act (R. 147, 151). The object in the mind of the switch crew "was to shove into the clear" (R. 52, 54, 58) or, as expressed by one of the switchmen, to effect a coupling at the

time wasn't the crew's "intention at all" (R. 667, 668). Under the circumstances impact contemplated by the Safety Appliance Act was not made and in the words of the foreman, the "lock blocks didn't fall * * * because we made the coupling too easy" (R. 69).

In *Atchison, T. & S. F. R. Co.* v. *Saxon*, 284 U. S. 458, 76 L. Ed. 397, 52 S. Ct. 229, this Court said: "The Supreme Court of the United States will, on reviewing the judgment of a State court, in an action under the Federal Employers' Liability Act, give special consideration to the facts in order to protect interstate carriers against unwarranted judgments. To warrant recovery under said Act negligence and its causal connection with the injury must be adequately established."

In *United States* v. *Chicago, B. & Q. R. Co.*, 237 U. S. 410, 59 L. Ed. 1023, is enunciated the rule that "* * * the controlling test of the statute's application relies in the essential nature of the work done".

In *Louisville & Jeffersonville Bridge Company* v. *United States*, 249 U. S. 534, 63 L. Ed. 757, this Court distinguished, a transfer of a train as a unit, from one railway terminal to another for delivery without uncoupling or switching out any cars, from work described as "a sorting, or selecting, or classifying of them, involving coupling and uncoupling, and the movement of one or a few at a time for short distances".

Can the "very light" contact applied in this case be considered such an impact as contemplated by the Act? In view of the character of the work being done, we think not. Yet the trial court charged that "it was the absolute duty of the defendant to equip and maintain on the cars here involved, couplers coupling automatically by impact, and if defendant failed in that duty it was negligent"; further, "if you find that defendant was negligent by reason of noncompliance with the Act of Congress which I have read, the

defenses of contributory negligence and assumption of risk are not available to the defendant'' (R. 1310, 1311). This was assigned as error (R. 1370, 1371).

2. *It was error to enter judgment based on a scintilla of evidence.*

At the conclusion of respondent's case petitioner moved for a directed verdict on the grounds that respondent failed to carry his burden of proof, failed to prove any actionable negligence, failed to eliminate existing disease as the cause of his disability and was resting his case on mere speculation and conjecture (R. 1203).

Relying upon a violation of the Federal Safety Appliance Act, respondent must of necessity prove as stated in *Lang* v. *N. Y. C. R. Co.*, 255 U. S. 455, 65 L. Ed. 729, ''a causal relation between the fact of delinquency and the fact of injury''.

The alleged violation of the Safety Appliance Act was simply one of several antecedent events, such as the catching of respondent's mackinaw jacket as he was leaving the cars (R. 127, 137, 138, 139), but such claimed violation of the Act was not in a legal sense the proximate cause of the insanity. See *St. Louis, etc. Ry. Co.* v. *Commercial Insurance Co.*, 139 U. S. 223, 35 L. Ed. 154.

After falling respondent immediately arose and describes his actions as follows: ''I walked up there about 15 or about 20 cars or so and then they pulled out. * * * I rode on the cars. * * * They * * * cut them off and I took them down a ways and stopped them with the air'' (R. 295). Respondent denied that he was rendered unconscious by the accident (R. 828, 853). In order to establish traumatic insanity he had to be rendered unconscious by the fall (R. 1115, 1116). He admits symptoms in all respects the same as those of arterial sclerotic psychosis, or in other words, senility (R. 330, 392). Nowhere

is it denied that "insanity due to trauma is very, very rare, * * * less than one-half of one per cent" (R. 977). Some three months subsequent to the fall his examining physician observed no evidence of psychosis (R. 387-391).

Manifestly the Court permitted the jury to choose between accident and disease and respondent's burden of proof is based upon a scintilla of evidence.

In *Pennsylvania R. Co.* v. *Chamberlain,* 288 U. S. 333, 77 L. Ed. 819, this Court disapproving the scintilla rule, said: "The rule is settled for the Federal courts, and for many of the State courts, that whenever in the trial of a civil case the evidence is clearly such that if a verdict were rendered for one of the parties the other would be entitled to a new trial, it is the duty of the judge to direct the jury to find according to the views of the court. Such a practice, this Court has said, not only saves time and expense, but 'gives scientific certainty to the law in its application to the facts and promotes the end of justice.' (Citing cases.) The scintilla rule has been definitely and repeatedly rejected so far as the Federal courts are concerned. (Citing cases.) Leaving out of consideration, then, the inference relied upon, the case for respondent is left without any substantial support in the evidence and a verdict in her favor would have rested upon mere speculation and conjecture. This of course is inadmissible."

To like effect see:

Chicago, M. & St. P. Ry. Co. v. *Coogan,* 271 U. S. 472, 70 L. Ed. 1041.

Gulf, M. & N. R. R. Co. v. *Wells,* 275 U. S. 455, 72 L. Ed. 370.

A. T. & S. F. Ry. Co. v. *Toops,* 281 U. S. 351, 74 L. Ed. 896.

Southern Ry. Co. v. *Walters,* 284 U. S. 190, 76 L. Ed. 239.

Chicago, G. W. R. R. Co. v. *Rambo,* 298 U. S. 99, 80 L. Ed. 1066.

3. *It was error to admit testimony showing family responsibilities such as the sickness, poor health, disability and hospitalization of respondent's wife.*

Over the objection of petitioner, respondent was permitted by the trial court to show that his wife was "in the hospital" (R. 237, 238), was not "in good health" (R. 256), was not able to do her "own housework" (R. 257) because she "had been sick" and had not been "feeling well" (R. 258).

In the case of *Pennsylvania Company* v. *Roy,* 102 U. S. 451, 26 L. Ed. 141, testimony of this character was considered reversible error, the court saying: "The court, in a manner well calculated to attract the attention of the jury, withdrew from their consideration the evidence touching the financial condition of the plaintiff; but as nothing was said by it touching the evidence as to the ages of his children, they had the right to infer that the proof as to those matters was not withdrawn and should not be ignored in the assessment of damages.

"For this error alone the judgment is reversed, and the cause remanded for a new trial."

The rule expressed in the last cited case was followed in *Southern Pacific Co.* v. *Ralston* (C. C. A. 10th Circuit), 67 F. (2d) 958, and *Chicago & N. W. Ry. Co.* v. *Kelly* (C. C. A. 8th Circuit), 74 F. (2d) 31.

The conduct here complained of was condemned by the Supreme Court of Minnesota in the first appeal reported in 203 Minnesota 312, at page 323 in these words: "The questions asked of plaintiff's wife with the obvious purpose of arousing the sympathy of the jury by showing that she was in bad health should have been excluded and the an-

swers stricken." The majority opinion in the present case makes no mention of this appeal to passion and prejudice, but the dissenting opinion does in these words: "As in the first trial counsel was careful to bring out the fact that plaintiff's wife was in poor health" (R. 1420). Through the questions and answers here permitted over petitioner's objection there was a direct appeal to the sympathy of the jury in such a way as to pervert the applicable Federal Acts and decisions of this Court. It was all the more objectionable because condemned by the Supreme Court of Minnesota upon the first appeal and closely allied with the corrupting influence discussed in our next title.

4. *It was error to allow judgment against petitioner to be based on a verdict arrived at by appeal to sympathy and corrupted by passion and prejudice.*

Scaling the heights of rhetoric and with unusual oratorical ability, counsel appealed to the sympathy, passion and prejudice of the jury in these words:

> "And I think the thing that has surprised me the most of anything in this case when Mr. Ledin, the assistant superintendent of that road, came in here before all of us and said that he felt that under those circumstances the conductor was justified in giving the come-on signal and not testing the coupling.
>
> *"I hope that if there are any grievance committee men in this court room who are hearing me now that they will call to the attention of the superintendent of the road what the assistant superintendent said in this case approving the sort of thing that was done by the conductor, Hunter. When railroad men are criticized for this kind of movement I do not believe that any railroad man will ever be guilty of that kind of a movement again"* (R. 1277). (Italics ours.)

and in the light of the prejudicial testimony permitted by the trial court relative to family responsibilities, counsel continued in these words:

> "What is liberty worth? What is the right and the ability to be self-sustaining and self-respecting worth? What is it worth to a man who has lived and worked and perspired honestly to have the realization that he is a man able to face the world and to *support his family?*" (R. 1288). (Italics ours.)

Similar conduct had been condemned by the Supreme Court of Minnesota in the first appeal reported in 203 Minnesota 312, at pp. 322 and 323 where it was said:

> "* * * These remarks suggest that counsel for the plaintiff appreciated the difficulty the jury might have in finding a verdict in his favor upon the merits and *hence this appeal to sympathy to base their verdict not upon what the plaintiff might be entitled by law to recover but upon what he needed in order to care for the invalid wife, widowed daughter, and grandchild. Sympathy may be as potent a microbe to give justice the blind staggers as may prejudice or any other improper consideration,* and had these remarks been seasonably objected to as the rules of the district court permit, the trial court would doubtless have done what it could to protect the jury from this assault upon their sympathy. The situation borders closely upon a case where the trial court should, upon its own motion, have restrained the zeal of counsel." (Italics ours.)

In the present case exception was duly taken to the prejudicial remarks of counsel and the trial court's attention directed thereto (R. 1293, 1294) and error was assigned on appeal to the Supreme Court of Minnesota (R. 1376-1382).

The trial court made no attempt to restrain the zeal of counsel and did nothing to correct the error by proper instruction to the jury. Subsequent to the return of the

verdict, the court acknowledged that "the argument complained of might better have been omitted" but proceeded to condone it because "uttered in the heat and enthusiasm of argument" (R. 1394); the Court's uneasiness about the improper argument is reflected in these words: "I feel that the verdict is somewhat large and should be reduced to $15,000" (R. 1393). This attitude of the trial court is criticized by Associate Justices Stone and Loring in their dissenting opinion in the Supreme Court of Minnesota in these words:

"We come then to the effect of the Federal rule announced in M. St. P. & S. S. M. Ry. Co. *v.* Moquin, 283 U. S. 520, which held that if passion or prejudice enter into the result in any degree the verdict cannot be permitted to stand. The court said, speaking through Mr. Justice Roberts:

> *'Obviously such means may be quite as effective to beget a wholly wrong verdict as to produce an excessive one. A litigant gaining a victory thereby will not be permitted the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent.'*

The rule is peculiarly applicable in a case like this where the question of defendant's liability is a close one due to the fact that connection as cause between the plaintiff's fall and his present condition is so much in doubt and where the defendant's evidence was so persuasive as to convince the trial court that the plaintiff's condition was due to arteriosclerosis (R. 1392).

"*It cannot be said that under the Federal rule, which is much more logical and more just than our own, that the trial court's error was without prejudice to defendant. If passion or prejudice influenced the verdict then defendant was entitled to a new trial on all issues.* It might as well be said that there would be no prejudice where the court

specifically stated in the order that he found passion or prejudice.

"*We are not in accord with the statement in the principal opinion that there is nothing in the record which indicates passion or prejudice. As in the first trial counsel was careful to bring out the fact that plaintiff's wife was in poor health. He also endeavored in his closing argument to invoke action by the employes' grievance committee against one of defendant's material witnesses, obviously for the purpose of arousing prejudice in the minds of the jury. We do not think a court's finding that there was prejudice could be upset on this record and verdict. The situation was such that the sympathies of the jury were likely to be aroused and the effect upon the jury's verdict was commented upon in the previous opinion in this case by a unanimous court.* Passion or the sympathy which results in prejudice is not apt to be disclosed by the cold record, and usually, as this court said in Nelson *v.* West Duluth, supra, the size of the verdict is the best indication of whether or not it was the result of a fair and impartial trial" (R. 1419-1421). (Italics ours.)

The vigorous dissent above quoted from is strictly in accord with the decision of this Court in the case of *M. St. P. & S. S. M. Ry. Co.* v. *Moquin,* 283 U. S. 520, 75 L. Ed. 1243.

The same rule was applied in *N. Y. C. R. R. Co.* v. *Johnson,* 279 U. S. 310, 73 L. Ed. 706, where judgment for an injured passenger against a railroad company was reversed because counsel's argument to the jury "so plainly tended to excite prejudice as to be ground for reversal". The court based that decision on the "paramount consideration" that the State is concerned that litigation be "fairly and impartially conducted". It was held to be the duty of the Court on its own motion to "protect suitors in their

right to a verdict uninfluenced by the appeals of counsel to passion and prejudice".

Enforcement of that principle by this Court would seem particularly appropriate in order to secure uniformity in cases arising under the two Federal Acts here involved. Plaintiffs in like cases would otherwise choose the forum of courts tolerant of appeals to passion and prejudice.

The opinion of the dissenting Justices of the Minnesota Supreme Court in the case at bar is also in accord with the principle adopted in *Arkansas Cattle Co.* v. *Mann*, 130 U. S. 69, quoted as follows:

> "Where the circumstances clearly indicate that the jury were influenced by prejudice * * * that remedy (remission of part of the damages) cannot be allowed. *Where such motives or influences appear to have operated, the verdict must be rejected, because the effect is to cast suspicion upon the conduct of the jury and their entire finding.*" (Italics ours.)

Previous Minnesota decisions are in accord with the last quoted view of this Court. *Masteller* v. *G. N. Ry. Co.*, 100 Minn. 236; *Ewing* v. *Stickney*, 107 Minn. 217; *Roemer* v. *Schmidt Brewing Co.*, 132 Minn. 399; *Flanery* v. *C. M. & St. P. Ry. Co.*, 158 Minn. 384; *Westover* v. *C. M. St. P. & P. Ry. Co.*, 197 Minn. 194, all held that it is mandatory to set aside such a verdict. In the last cited case the Minnesota court emphasizes this thought in the following words:

> "*In the light of the expression of the Supreme Court in M. St. P. & S. S. M. Ry. Co. v. Moquin, 283 U. S. 520, 51 S. C. T. 501, 75 L. Ed. 1243, we think the verdict is vitiated on all issues by passion and prejudice and that on that account the order granting a new trial must be modified so that the case will be resubmitted on all issues.*" (Italics ours.)

That petitioner did not have a fair trial of the issue of its negligence is no mere matter of procedure not involv-

ing substantive right. The judgment here sought to be reviewed is based upon a verdict arrived at by appeal to sympathy, passion and prejudice. In that respect it deprives petitioner of its property without due process of law. The United States statutes relied upon by respondent are fundamentally perverted when passion and prejudice against a railroad are substituted for an impartial finding of negligence without the existence of which the law contemplates no liability whatever.

Respectfully submitted,

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May 8, 1940.

SUPREME COURT
OF THE
UNITED STATES
OCTOBER TERM, 1939

No. [redacted]81

DULUTH, MISSABE AND IRON RANGE RAILWAY COMPANY, a corporation,

Petitioner,

vs.

THOMAS HENRY ROSS, BY ADA ROSS, General Guardian,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Minnesota

Brief For Respondent In Opposition

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SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1939

No. 1014

DULUTH, MISSABE AND IRON RANGE RAILWAY COMPANY, a corporation,

Petitioner,

vs.

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Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Minnesota

---

Brief For Respondent In Opposition

I.

OPINIONS OF THE COURT BELOW

Ross v. D. M. & I. R. Ry. Co.,
291 N. W. Reporter 610 (R. 1426)
(Not officially reported)

Ross v. D. M. & I. R. Ry. Co.,
290 N. W. Reporter 566 (R. 1397)
(Not officially reported)

Ross v. D. M. & I. R. Ry. Co.,
203 Minn. 312,
281 N. W. 76.

In the opinion now under review, reference is made to the earlier opinion in 203 Minnesota 312, where a new trial was granted because of error in the admission of certain evidence. The record in the earlier trial is not before the Court on this Petition, and it differs in certain important respects from the record now under review.

The opinion of the trial court appears in a memorandum at pages 1383-1394 of the Record.

II.

JURISDICTION

Respondent concedes jurisdiction to review the applicability of the Federal Safety Appliance Act to the cars and the operation in question, as well as the violation of said Act; but he contends that the Judgments of the State Courts accord with the applicable decisions of this Court. Respondent denies that the "admission of testimony" at the trial or "the findings of the court below that the verdict was not arrived at by appeal to sympathy and corrupted by passion and prejudice" are subject to review by this court on the record presented, and the prior decisions of this Court.

III.

STATEMENT OF THE CASE

Since the questions presented for review are purely questions of fact, and since the courts below have resolved the issues of fact favorable to Respondent, it is unfortunate that Petitioner's statement fails to include any of the facts which support the verdict and judgment. Accordingly, a further statement of facts is required.

To avoid repetition Respondent refers to the trial court's memorandum for a clear statement of the circumstances sur-

rounding the accident (R. 1383-1387). The following additional facts are material and significant as supporting the verdict and the decisions of the courts below.

In the operation described in the memorandum, the conductor was in full charge of the train movements (30-31), and both he and Respondent, the brakeman, were standing on the ground, when the cars were bumped, and there was no one stationed near the hand brakes to stop the two cars should the coupling fail to make (48, 50, 76, 437, 443-4). The conductor intended to couple said two cars on to the train attached to the locomotive and control their movement by the locomotive; and he testified: "Well, that was the plan to shove them into the clear and make the coupling—(51)".

When Respondent saw the conductor give the signal indicating that the coupling had been made, he stepped up and rode for some distance on the corner steps of the car. He thought that the cars were coupled to the rest of the train, according to the conductor's signal (443-444). He was looking forward in the direction the train was moving, and did not discover that the coupling had failed until the speed caused him to look back. The car he was on was then seven or eight car lengths away from the cars which were attached to the engine (444). The cars were gaining momentum. Respondent was on the foremost of the two cars. He was on the end of the car farthest away from the hand brake. He saw that a collision would occur between the two cars on which he was riding and a string of steel ore cars parked further down on the same track. He tried to reach the front end of the car to set the hand-brake, but, by the time he got there, there was no time to set the brake before the collision. He tried to save himself by getting down on to the ladder on the side of the

car. While he was doing so the cars collided, and he was thrown from the ladder about 20 feet onto the crushed rock road-bed (115, 444-5). The cars on which he was riding were travelling between 35 and 40 miles per hour when they collided (121).

In the collision and his accompanying fall Respondent was knocked unconscious (290). When he regained consciousness he was stunned and dizzy, and felt a pounding sensation in his head (294). This condition continued for several days (296). There was a bruise on his head and a lump swelled on his temple (238, 240, 264, 294). That night he was very restless and nervous (263). X-ray films, taken for use on the trial, showed a fracture at the point where the bruising and the bump appeared on his head (310-312, 350-353, 409).

Before his injury it is not disputed that Respondent was friendly, calm and normal; that he had always enjoyed good health, and worked steadily (160-164, 174, 214-215).

Following his injury Respondent showed marked and significant symptoms, physical, nervous and temperamental. The character and extent of his injuries will be referred to in the argument concerning the sufficiency of the evidence, and proximate cause. The facts as found by the Supreme Court of Minnesota are recited at pages 1399, 1401, 1402 (d), 1403-1405 of the Record.

IV.

SUMMARY OF THE ARGUMENT

A.

THE FEDERAL SAFETY APPLIANCE ACT WAS VIOLATED AND IT GOVERNS THE CARS AND THE OPERATION IN QUESTION:

(a) Petitioner's cars were "used on its line - - - in moving interstate traffic", and on the occasion in question they did not couple "automatically by impact."

(b) Whether the conductor intended to make a coupling is not material.

(c) The evidence sustains a finding of both intent and necessity to couple.

(d) The defective coupler was clearly a proximate cause of Plaintiff's injury.

(e) Contributory negligence and assumption of risk, as defenses, are eliminated where a violation of the Safety Appliance Act is found.

(f) Whether the couplers were defective and whether such defect was a proximate cause of Respondent's injury, were questions of fact, which having been determined favorably to Respondent by the State Courts will not be reviewed by this court.

B.

THE JUDGMENT IS SUPPORTED BY ABUNDANT EVIDENCE. IT DOES NOT REST ON A MERE SCINTILLA OF EVIDENCE AS CLAIMED:

(a) The failure to couple automatically by impact on one occasion supports a finding of negligence.

(b) Setting cars in motion on a down grade without brakes or coupling attachment to control them supports a finding of negligence.

(c) The Record establishes causal connection between Petitioner's negligence and Respondent's disability.

(d) Where there is evidence to support the verdict and the judgment below, this Court will not usurp the function of the State Court as a trier of the facts.

C.

THE ADMISSION OF EVIDENCE REGARDING THE HEALTH OF RESPONDENT'S WIFE IS NOT CAUSE FOR REVERSAL OR REVIEW BY THIS COURT:

(a) The admission of such evidence was proper under the circumstances, and was clearly discretionary with the trial court.

(b) The admission of evidence being procedural and discretionary will not be reviewed by this court.

D.

THE JUDGMENT IS GOOD AGAINST PETITIONER'S CLAIM THAT THE VERDICT IS THE RESULT OF SYMPATHY, PASSION AND PREJUDICE:

(a) Whether sympathy, passion or prejudice improperly influenced the verdict is a question peculiarly within the discretion of the trial court.

(b) Both of the Courts below expressly found that the verdict was not influenced by sympathy, passion or prejudice.

(c) The record and the argument of counsel justify the findings of the Courts below. There was no abuse of discretion.

(d) The record on the first trial cannot avail Petitioner here.

(e) The propriety of denying a new trial on condition that the verdict be reduced has long been recognized as discretionary with the trial court where it appears that the verdict was not influenced by passion or prejudice.

(f) This Court will not reverse the State Courts on questions peculiarly within their discretion except on a clear showing that the State Courts have abused their discretion.

(g) *M., St. P. & S. St. M. Ry. Co. v. Moquin* supports the judgment.

(h) None of Petitioner's points, except the first presents a Federal question. They are, therefore, not reviewable in this court.

V.

THE ARGUMENT

A.

THE FEDERAL SAFETY APPLIANCE ACT GOVERNS THE CARS AND THE OPERATION IN QUESTION AND THE STATUTE WAS VIOLATED BY PETITIONER:

(a) Petitioner's cars were "used on its line—in moving interstate traffic", and on the occasion in question they did not couple "automatically by impact." The Courts below were, therefore, justified in finding that the Federal Safety Appliance Act applied to the cars and the operation in question, and that it was violated.

L. & N. Ry. Co. v. Layton
243 U. S. 617
37 S. Ct. R. 456

"By this legislation the qualified duty of the common law is expanded into an absolute duty with respect to car couplers, and if the defendant railroad companies used cars which did not comply with the standard thus prescribed, they violated the plain prohibition of the law, and there arose from that violation a liability to make compensation to any employee who was injured because of it." (Citing cases). * * *

"The language of the acts and the authorities we have cited make it entirely clear that the liability in damages to employees for failure to comply with the law springs from its being made *unlawful to use cars*

not equipped as required,—not from the position the employee may be in, or the work which he may be doing at the moment when he is injured."

Atlantic City R. Co. v. Parker
242 U. S. 56
37 S. Ct. R. 69

M. & St. L. Ry. Co. v. Gotschall
244 U. S. 66
37 S. Ct. R. 598

(b) Whether the conductor intended to make a coupling is not material. The statute expressly covers every car "used" in inter-state traffic, regardless of the intent of the trainmen.

The cars and their use are clearly within the Statute for at the time of the accident in question it is admitted that the cars were standing on a 2% grade without any brakes being set or other means of preventing their movement down grade. There was no man stationed on the cars to set the hand brakes (R. 63, 64, 76, 77, 442, 443). Under such circumstances safe and proper railroad practice required that the coupling be made and tested (R. 481, 482, 515-517). Accordingly, the only way in which an impact between the moving train and the two stalled cars could be made with safety would be by effecting a coupling between them. Otherwise the two cars would run wild and injure the workmen. It was the custom and practice on Defendant's railway to test the coupling under such circumstances (R. 118-120, 692, 693, 700, 701, 710).

(c) The record clearly justifies the finding that the conductor intended to make a coupling.

The conductor's testimony indicates such an intention (R. 50-51, 53, 56, 58, 59, 60-62, 560, 561). The conductor's intention to make a coupling is further indicated by the fact that he gave the engineer the usual coupling signal (R. 438, 439, 440, 441, 456, 682, 683). The conductor testified that the cars came together and coupled, and that he stood there and watched the coupling make as the cars came together; that both the pins in the couplers dropped, and that he took it for granted that the coupling was made (R. 60, 61, 67).

Petitioner's contention that the reason why the coupling did not make was because the impact was "very light" is disproved by the testimony of Defendant's trainmen. The evidence was that the train was moving at a speed of five or six miles per hour (R. 102). One of the trainmen testified that if the couplers were in proper condition they would couple automatically with the train moving at a speed of three miles per hour (R. 549-550). Furthermore, Petitioner's excuse is entirely beside the point, for the statute requires that all cars "used" shall be equipped with couplers that couple "automatically by impact", and there is no specification as to the rate of speed. It is the impact of the cars coming together and not the speed which produces the danger that the statute was intended to obviate. The train movement in question was one which required that the coupling make. The movement could not be made with safety otherwise. The conductor thought and assumed that the coupling was made (R. 60-61,

67). Respondent also believed that the coupling was made and relied upon it (443-444).

The conductor also testified that at times couplers become rusty and dirty, and that a heavier impact is required to effect a coupling where rust or dirt is present (R. 70, 73). Sometimes iron ore gets into the couplers and interferes with automatic coupling (R. 468-469). Where rust and iron ore gets into the couplers proper treatment requires that it be cleaned out (R. 73).

(d) The defective coupler was clearly a proximate cause of Respondent's injury.

If the cars had coupled automatically by impact as required by the statute they could not have gotten away (R. 451, 452, 517, 687). Where hand-brakes are not set and the air has been bled off the only way to stop or to control the movement of the cars was by coupling them onto the train (R. 158).

Whether the defective coupler was the proximate cause of Respondent's injury was clearly a jury question.

M. St. P. & S. St. M. Ry. Co. v. Goneau
269 U. S. 406
46 S. Ct. R. 129

Brady v. Terminal Ry. Assn. of St. Louis
303 U. S. 10
58 S. Ct. R. 426

(e) Contributory negligence and assumption of risk, as defenses, are eliminated by the statute where a violation of the Federal Act occurs.

C. G. W. Ry. Co. v. Schendel
267 U. S. 287
45 S. Ct. R. 303

(f) Whether the couplers were defective and whether such defect was a proximate cause of Respondent's injury, were questions of fact, which having been determined favorably to Respondent by the State Courts will not be reviewed by this court.

C. R. I. & P. Ry. Co. v. Brown
229 U. S. 317
33 Sup. Ct. R. 840

"The trial court and the circuit court of appeals, considering the evidence, confirmed the finding of the jury, expressed by its verdict. It would be going far to say that these concurring judgments are not such as could be reasonably formed, but such as must be pronounced to be without foundation as a matter of law."

B.

THE JUDGMENT IS SUPPORTED BY ABUNDANT EVIDENCE. IT DOES NOT REST ON MERE SCINTILLA OF EVIDENCE, AS CLAIMED:

(a) The failure to couple automatically by impact on one occasion supports a finding of negligence.

C. R. I. & P. Ry. Co. v. Brown
229 U. S. 317
33 S. Ct. R. 840

M. & St. L. Ry. Co. v. Gotschall
244 U. S. 66
37 S. Ct. 598

"The jury, under an instruction of the court, was permitted to infer negligence on the part of the company from the fact that *the coupler failed to perform its function, there being no other proof of negligence,* * It is insisted that this was error, since, as there was no other evidence of negligence on the part of the company the instruction of the court was erroneous as, from whatever point of view looked at, it was but an application of the principle designated as res ipsa loquitur, a doctrine the unsoundness of which, it is said, plainly results from the decisions in Patton v. Texas & P. Ry. Co., (citing other cases). We think the contention is without merit because, conceding in the fullest measure the correctness of the ruling announced in the cases relied upon to the effect that neg-

* (Italics supplied wherever it appears, unless otherwise stated.)

ligence may not be inferred from the mere happening of an accident except under the most exceptional circumstancs, *we are of the opinion such principle is here not controlling in view of the positive duty imposed by the statute upon the railroad to furnish safe appliances for the coupling of cars. (citing cases)"*

Atlantic City Ry. Co. v. Parker
242 U. S. 56
37 S. Ct. R. 69

(b) Setting the cars in motion on a down grade without brakes or coupling attachment to control them clearly supports a finding of negligence.

See Trial Court's memorandum (R. 1386-1387).

(c) The record clearly establishes causal connection between Respondent's injury and his mental deterioration which began immediately.

The judgment does not rest on a mere scintilla of evidence, as claimed by Appellant, but is sustained by positive proof, much of which is not disputed. Respondent's undisputed condition before and after the accident positively proves the causal connection between his injury and his psychosis:

1.—PHYSICAL CONDITION BEFORE THE ACCIDENT.

Before the accident Plaintiff was a healthy normal man in every respect. He had worked for Defendant for about thirty years with practically no illness or loss of time. There

was no mental or nervous ailment in his family or ancestors (R. 160-161, 170, 174, 214, 215, 240, 255, 256, 277, 278, 296, 450-451). A few weeks before his injury Respondent performed physical labor on a high ladder and displayed no mental, nervous or physical weakness (R. 172-174). He performed similar work a few months previously (R. 162-163).

2.—PHYSICAL CONDITION AFTER THE ACCIDENT

In the accident, Respondent was thrown from the side of a steel ore car travelling at a speed estimated between 25 and 40 miles per hour, when it collided with a string of stationary ore cars parked on the same track (R. 115-117, 288). He was thrown to the right-of-way which was very hard (R. 117, 288, 445). He was rendered temporarily unconscious (R. 289-293). On regaining consciousness, he felt "stunned and almost paralyzed." He was dizzy and felt a pounding sensation in his head. That condition continued all day, and for some time thereafter (R. 294, 295, 296). He suffered an injury on his temple (R. 294) and a scar was visible, at the point of the injury, at the time of the trial (R. 238-240, 265). X-ray films taken for use at the trial showed evidence of skull fracture at the point of said injury. Several experts testified to the skull fracture (R. 310-316, 350-353, 408-409, 1142-1152). Almost immediately following the accident and continuously thereafter he became and was restless and nervous, his hands shook so that he had difficulty in feeding himself, and he appeared weak and shaky, his eyes appeared wild, and his person and appearance became slovenly. None of these symptoms existed before the injury; some of them developed within 24 hours after the injury, and all of them developed within two or three weeks following the accident (R. 160-161, 166, 167, 169, 170,

174, 175, 217, 219-221, 226-227, 238-239, 242, 259, 261-264, 266-267, 270).

3.—BEHAVIOR AND DISPOSITION BEFORE THE ACCIDENT.

There is no dispute in the evidence that before the accident plaintiff's disposition was calm, friendly and normal (R. 100, 149, 160-161, 174, 214-215).

4.—BEHAVIOR AND DISPOSITION IMMEDIATELY AFTER THE ACCIDENT.

Almost immediately after the accident Plaintiff's behavior and disposition changed greatly. The examining board, appointed by the Probate Court, to inquire into Respondent's sanity, found:

> "* * * Expansive delusions of ability to buy cars, furniture, etc. * * * *Had a fall last summer*, followed by a gastric hemorrhage in August, 1936. Has been weak, unable to work and *mentally changed ever since.* Changed personality, excitability, etc. * * *" (R. 235-236).

The day following the accident and thereafter Respondent became very profane (R. 168-169, 175-176, 220). Almost immediately he began to talk foolishly and to have delusions about "crooks" breaking into his house and stealing his money (R. 167, 174, 176, 178-179). He insisted on sleeping in the basement and arose at four A. M. (R. 240-241); he became extravagant and irrational in making purchases (R. 221-222); within a few days after the accident he bought a bed room

suite and a rug for his wife's room which were much too large for the room; the edges of the rug had to be turned in (R. 184-186, 225). He bought a new automobile with all the latest accessories which he wanted to give to his daughter, and he was offended when she refused it (R. 208-211). Nine days after the accident he purchased new and expensive clothing and luggage which he could not pay for (R. 193-197). Ten days after the accident he had his golf clubs plated with chromium and gold (R. 199-204). Many of the articles which he purchased were later re-possessed by the merchants who sold them.

The promptness of the psychosis following the accident is sufficient proof of the causal connection to support the verdict, particularly when coupled with the medical testimony.

Seven medical experts testified in Plaintiff's behalf. The jury's finding, which was approved by the Trial Court, and by the Supreme Court of Minnesota, to the effect that Respondent's mental deterioration was caused by the injury, is abundantly supported by the testimony of these experts (R. 309-313, 316). Dr Gordon R. Kamman, a specialist in nervous and mental disorders, testified:

> "I think Mr. Ross is suffering from the effects of an injury to the frontal lobes of his brain which is the result of the occurrence of minute hemorrhages distributed throughout the substance of these frontal lobes of the brain, that is the part up in front, which were the result of the injury which he sustained when he was thrown from the car, and which now are the cause of his present condition, his mental enfeeblement (R. 323)." (R. 324-330, 350-354)

In October, 1936, less than four months after the accident Dr. Mead, who examined the Respondent at the request of his family and before there was any thought of litigation, found that he had an intra-cerebral hemorrhage due to injury (R. 361). He testified that hemorrhages cause the formation of scar tissue and a reaction in the brain which elevates certain white blood cells, known as the P. M. N. cells; and that he found an elevation of the P. M. N. cells when he examined Respondent on Oct. 8th, 1936 (R. 359-363).

Dr Mead testified:

> "Mr. Ross was apparently perfectly well until the time of having had an accident which you have described. *Immediately following this accident certain variations in his ordinary wellbeing occurred and continued to progress* thereafter with various other manifestations until a definite diagnosis of mental incompetency was made which was sufficiently clear to justify commitment to a state institution. *That sequence of events developed following this injury, where preceding that time, there had been absolutely nothing.* My physical findings led me to recommend in October, 1936, that he have a skull X-ray and a spinal puncture which would further indicate that there were definite indications of preceding injury with resulting injury to the brain. With the development of those lesions or those symptoms and the progress of the case it would appear only logical to conclude that the accident which occurred to an apparently otherwise well individual precipitated the onset and the symptoms developed which have culminated in the present situation. Now, in contrast to that, if this were a disease process presenting this ultimate picture based on hardening of the arteries there are many factors which would not give as acute or sudden an onset as that to bring out this ultimate course. I do not know whether I make myself clear on that latter point, but

> *usually in a situation of that kind we do not have this sudden onset;* we would have the onset necessarily developing without any evidence of injury, but here we have positive injury connected with it, so that *I do not feel that hardening of the arteries at all explains the picture,* and, furthermore, our physical findings do not indicate that there is enough hardening of the arteries to possibly produce this picture." (R. 397-398)

Plaintiff's arteries are normal for a man of his age (R.398). Arteriosclerosis, which Petitioner's doctors stated was the cause of Respondent's mental disturbance, is a disease which grows progressively worse. Hence, if Plaintiff's condition were caused by arteriosclerosis it should be worse at the time of the second trial than it was at the time of the first trial, but medical examination and testimony showed that Respondent's condition was noticeably better at the second trial than it was at the first, (R. 399, 529) and his condition was definitely better at the time of the second trial in 1939 than is was when Dr. Mead first examined him in October, 1936 (R. 398-399). An examination of Respondent's eyes showed that the condition of his arteries is normal for a man of his age (R. 1086-1089). Dr. Spicer, a specialist in heart ailments and internal medicine, who examined Respondent, testified:

> "I found nothing that makes me think that he has heart failure. Blood pressure is just about normal, may be a few points up, for a man of his age." (R. 1163)

Dr. Spicer also testified that *medical authorities recognize, and that his own experience has proved, that serious brain injury may be caused by trauma without the loss of consciousness* (R. 1167-8).

Dr. E. E. Webber, who is inacurately called Respondent's "family physician" in Petitioner's brief, and who in fact is *Petitioner's chief surgeon,* and one of its medical witnesses at the trial, admitted that he did not know what caused Respondent's mental disturbance (R. 846-847, 850-851). Although Petitioner contended that Respondent's condition was caused by hypertensive disease its chief surgeon, Dr. Webber, admitted that he did not consider that Respondent *"ever was a marked hypertension case."* (R. 842)

On the record, as to the causal connection between Respondent's injury and his mental deterioration, the Trial Court found:

> "there was abundant evidence, if the jury saw fit to follow it, to warrant the finding that his condition is the result of his injury. It is true that the plaintiff worked during the balance of the day on which he was injured at his usual work, except for a short time when he rested on the bank, and that he continued working several days thereafter; that he then went to work at the 'jitney' job at Proctor and subsequently went to work on the hill, all for the defendant. It is, however, the testimony of the doctors called by the plaintiff that in injuries of this kind it is not unusual that punctate or pin-point hemorrhages may take place in the brain and that the hemorrhage is so slight that one suffering thereof is not incapacitated for some time thereafter, and if the jury accepted, which they evidently did, the doctors' opinions that such was the case here, they were justified in finding as they did." (R. 1390)

The Supreme Court of Minnesota reviewed the evidence bearing on the question of casual connection between the injury and the psychosis. The Court's opinion is at pages 1403-1405 of the Record. Its conclusion is that:

"Considered as a whole, the medical testimony raised a question of fact for the jury."

(d) Where there is evidence reasonably tending to support the verdict and the judgment of the lower court, this court will not usurp the function of the State Court as a trier of the facts.

G. N. Ry. Co. v. Donaldson
246 U. S. 121
38 S. Ct. R. 230

"The Circuit Court held that there was evidence sufficient to sustain the verdict and refused to disturb it. The Supreme Court of Washington affirmed the judgment. In this situation it is enough to say that *it is not the province of this court to weigh conflicting evidence. The record shows testimony supporting the verdict, and that is as far as this court enters upon a consideration of that question.*"

Brinkerhoff-Faris Trust & Savings Company v. Hill
281 U. S. 673
50 S. Ct. R. 451

C. & N. W. Ry. Co. v. Ohle
117 U. S. 123
6 S. Ct. R. 632

C.

THE ADMISSION OF EVIDENCE REGARDING THE HEALTH OF RESPONDENT'S WIFE IS NOT CAUSE FOR REVERSAL OR REVIEW BY THIS COURT:

(a) The admission of such evidence was proper under the circumstances, and was clearly discretionary with the trial court.

It was clearly discretionary with the Trial Court to admit evidence as to why Respondent's daughter was named as his nearest relative when he was being examined as to his sanity, and why his wife, who was later appointed as his guardian, was not then mentioned. The reason was, as disclosed by the testimony, that at that time his wife was ill. Clearly it was proper to show the reason, and no prejudice could possibly result to Defendant thereby. None has been shown.

By the same reasoning, it was discretionary with the Trial Court to admit evidence of the condition of Respondent's wife's health, in order to explain why it was that, on the afternoon of the accident, Respondent prepared his own supper and ate it alone in the kitchen; although his wife was then present in the house. It was Respondent's claim that he had been seriously injured on the day in question. It was Petitioner's claim that the injury was slight. If he was seriously injured, it would be reasonable to expect that his wife would prepare his supper, and that he would not be required to prepare his own. It was certainly proper, therefore, to admit evidence ex-

plaining why Respondent, rather than his wife, prepared the evening meal. That was the only purpose for which the evidence was received, and no possible prejudice could result to Defendant therefrom. None has been shown. No question of the wife's health was otherwise made, and there was no reference to it in the argument. The Supreme Court of Minnesota found that the verdict was not excessive, and that it was not influenced by sympathy or prejudice.

(b) The admission of evidence being procedural and discretionary will not be reviewed by this court.

Gila-Valley G. & N. Ry. Co. v. Hall
232 U. S. 94
34 S. Ct. R. 229

> "Questions of the *admissibility of evidence* are for the determination of the court; and this is so whether its admission depend upon matter of law or upon matter of fact. And *the finding of the trial judge upon such a preliminary question of fact is not subject to be reversed on appeal* or error if it be fairly supported by the evidence, as it is in the case before us."

Lee v. Central of Ga. Ry. Co.
252 U. S. 109
40 S. Ct. R. 254

> "Whether two causes of action may be joined in a single count or whether two persons may be sued in a single count are matters of pleading and practice relating solely to the form of the remedy. *When they arise in the state courts the final determination of such matters ordinarily rests with the state tribunals, even if the rights there being enforced are created by Federal law.*"

Central Vermont Ry. Co. v. White

238 U. S. 507

35 S. Ct. R. 865

"Some of the assignments in the present case relate to matters of pleading; others to *the admissibility of evidence*, to the sufficiency of exceptions, and to various *rulings of the trial court which involve no construction of the employers' liability act, and which, therefore, cannot be considered on writ of error from a state court.*

* * *

"There can, of course, be no doubt of the general principle that matters respecting the remedy—such as the form of the action, sufficiency of the pleadings, *rules of evidence*, and the statute of limitations—depend upon the law of the place where the suit is brought. * * *

"As long as the question involves a mere matter of procedure as to the time when and the order in which evidence should be submitted the state court can, in those and similar instances, follow their own practice *even in the trial of suits arising under the Federal law.*"

D.

THE JUDGMENT IS GOOD AGAINST PETITIONER'S CLAIM THAT THE VERDICT IS THE RESULT OF SYMPATHY, PASSION, AND PREJUDICE:

(a) Whether sympathy, passion or prejudice improperly influenced the verdict is a question peculiarly within the discretion of the trial court.

This has always been the law in Minnesota, and in the Federal Courts.

Watson v. St. P. City Ry. Co.
42 Minn. 46
43 N. W. 904

> "It was in the discretion of that court (the trial court) to determine, upon its own observation and judgment, the effect of such remarks upon the jury, and whether they were prejudicial to the defendant."

Gila-Valley G. & N. Ry. Co. v. Hall
232 U. S. 94
34 S. Ct. R. 229

> "If it appears that the verdict is tainted with prejudice or passion, and does not represent the dispassionate judgment of the jury upon the question of the right of the plaintiff to recover, a new trial should be granted,—*yet the trial court is in a better position*

to determine this than the appellate court, so that its determination should ordinarily be accepted."

Gulf, C. & S. F. Ry. Co. v. Curb
66 Fed. 519 (C. C. A. 8th)

"A verdict ought not to be set aside because the winning party did not have an ideal lawyer to argue his cause, or on the false assumption that the jury was destitute of common sense, and had such slight knowledge of the methods of lawyers as to fall an easy prey to their fallacious or false suggestions. But, however this may be, *the trial judge, who hears and sees all that occurs at the trial, is in a much better position than the appellate court to determine whether he should interfere because of alleged improper acts or remarks of counsel.* It is a matter relating to the decent and orderly conduct of the trial, and as such within the sound discretion of the trial court; and it is only when such discretion has clearly been abused, to the prejudice of the complaining party, that the appellate court will interfere."

(b) The trial Court and the Supreme Court of Minnesota both expressly found that the verdict was not influenced by sympathy, passion or prejudice.

The verdict was for $18,500.00. With reference to the verdict the trial court in its memorandum said:

"It is ordinarily for the jury alone to say what will fairly compensate a plaintiff for his injuries. The plaintiff has suffered lost time by reason of his injuries; he has been deprived of his liberty, is confined in an institution, and it has been conceded by the doctors on both sides of the case that he in all probability will either have to be confined or be fur-

nished with an attendant during the remainder of his life. Under those circumstances *one would expect a large verdict from a jury.* In view of the fact, however, that *he will be getting his estimated future earnings in a lump sum instead of at intervals through remaining years that he probably would have been employed,* I feel that the verdict is somewhat large and should be reduced to $15,000. However, *there isn't any indication that the jury was actuated by any feeling of passion or prejudice or sympathy in the rendition of their verdict.*

"The defendant also complains of counsel's argument to the jury, particularly to that portion thereof which expressed the hope that if members of the grievance committee were present they would report to the superintendent of the defendant railway company the testimony the assistant superintendent had given that an operation, the circumstances of which were detailed in counsel's question, was not a negligent one. The circumstances detailed might well, in my opinion, constitute negligence, and counsel while vigorously pressing the argument to the jury that such circumstances necessarily constituted negligence, gave expression to the hope complained of. While the portion of the argument complained of might better have been omitted, it was uttered in the heat and enthusiasm of argument in connection with the testimony which counsel was then criticizing. Some latitude must be given to counsel when arguing to the jury and while, as previously said, the argument might better have been omitted, *I feel that no prejudice to the defendant resulted therefrom.*" (R. 1393-1394)

With reference to the verdict and the claim of passion and prejudice, the Supreme Court of Minnesota said:

The memorandum makes it clear that the trial court found no passion or prejudice on the part of the jury and *in this it was sustained by the record.* * * *

We do not think that appellant was prejudiced by the order as made. It received a reduction of $3,500.00 to which it was not entitled. This is so because *the record does not sustain a finding of passion and prejudice.* * * * It does not follow as a matter of law that damages are considered excessive by reason of passion and prejudice when reduced by the trial court. Goss v. Goss, 102 Minn. 346, 113 N. W. 690. * * * *The memorandum clearly indicates that the trial court found no passion or prejudice. The record fully justifies such a finding.* Defendant having profited by it is not in a position to complain." (R. 1411-1413)

(c) The record of the evidence and argument of counsel fully sustain the finding of the trial court and the Supreme Court of Minnesota that there was no passion or prejudice. There was no abuse of discretion.

Reference, in the argument, to the Assistant Superintendent's testimony approving the train movement which caused the accident was justified, and was not prejudicial. The Assistant Superintendent, Ledin, was asked to assume that what the evidence showed was true,—namely, that two cars stood on a 2% down grade; that the conductor who was in charge had completely "bled" the air and released the brakes on one car, and that he knew that the trainman (Respondent) had been bleeding the air on the other car for the same length of time, and that the conductor did not know how much, if any, air remained on the other car, and that the fact was that there wasn't air enough on the other car to hold the brakes, and that when the train bumped into the two stationary cars the brakes let go, and that there was no one stationed on either of the cars in a position to set the hand brakes. Mr Ledin was then asked whether, assuming the facts stated to be

true, the conductor would be justified, "*according to the custom and practice on your road, in taking a chance on those cars running away,*" when they were put in motion by impact with a moving train, and the conductor did not make a test to see whether or not the coupling was made. To that question Mr. Ledin answered: "Yes, he would be justified."

If such was the "custom and practice" on Defendant's railway no one will question that such custom and practice should be corrected, for what could be more dangerous than to start ore cars running wild down a 2% grade with no brakes set, and no man or means available to control their movement? Surely such custom and practice should be called to "the attention of the superintendent of the road". As was suggested in the argument it was proper for the "grievance committee" to discuss such a custom and practice with the superintendent, in order to obviate similar accidents in the future. Surely there was nothing prejudicial in calling the attention of the railway to this defect in its customary operation. That the argument was intended not to prejudice the jury, but to obviate similar accidents in the future, is clearly shown by the language employed by counsel in his argument as quoted on page 18 of Petitioner's brief. There is nothing in the language which suggests passion or prejudice, nor has any been shown. Both the trial court and the Supreme Court found that none occurred.

Reference to Counsel's argument for Respondent (R.1245-1294) discloses that at no time in the argument was any reference made to "family responsibilities" complained of in Petitioner's brief, (P. 19). The questions asked in the argument, of which Petitioner complains, were perfectly proper considering the evidence in the case. The evidence proved

that Respondent had lost his liberty; that he had lost ability to be "self-sustaining", and it was admitted by Petitioner's doctors that Respondent would never again be able to have his liberty, or to support himself. These then were clearly items of damage suffered by Respondent. Not only was it proper to call them to the jury's attention but counsel would have been derelict in his duty to his client had he failed to do so.

(d) The record on the first trial cannot support Petitioner here.

The reference in Petitioner's brief to what was said in the dissenting opinion with reference to the argument at the first trial is beside the point. It cannot support the Petition. The record and the argument on the first trial were substantially different from that now before the Court. They are not before the Court in this proceeding. Therefore, they cannot be considered by this court.

Both the Trial Court and the Supreme Court of Minnesota held that there is nothing in the argument which Petitioner criticizes which would justify the granting of a new trial. The Trial Court's memorandum states:

> "Some latitude must be given to counsel when arguing to the jury, and while, as previously stated, the argument might better have been omitted, *I feel that no prejudice to the defendant resulted therefrom.*" (R. 1394)

The opinion of the Supreme Court of Minnesota was:

> "We do not think it so exceeded the permissible limits as to justify granting another trial." (R. 1406)

(e) Whether there was prejudicial misconduct, and whether a new trial should be denied conditional on a reduction of the verdict have long been recognized by the courts of Minnesota and the Federal Courts as being within the discretion of the trial court where it appears that the verdict was not influenced by passion or prejudice.

Watson v. St. Paul City Ry. Co.
42 Minn. 46, at 48
43 N. W. 904

"It was in the discretion of that court (the trial court) to determine, upon its own observation and judgment, the effect of such remarks upon the jury, and whether they were prejudicial to the defendant."

Horsman v. Bigelow
184 Minn. 514, at foot 517
239 N. W. 250

"Misconduct of counsel will not warrant a reversal on that ground unless the rights of the losing party have been prejudiced thereby. Powell v. Standard Oil Co., 168 Minn. 248, 255, 210 N. W. 55."

Goss v. Goss
102 Minn. 346
113 N. W. 690

Ross v. D. M. & I. R. Ry. Co.
..... Minn. .....
290 N. W. 566

Northern Pacific Ry. Co. v. Herbert
116 U. S. 642
6 S. Ct. Rep. 590

"The exaction, as a condition of refusing a new trial, that the plaintiff shall remit a portion of the amount awarded by the verdict was a matter *within the discretion of the court.* It held that the amount found was excessive, but that no error had been committed on the trial. In requiring the remission of what was deemed excessive it did nothing more than require the relinquishment of so much of the damages as, in its opinion, the jury had improperly awarded. *The corrected verdict could, therefore, be properly allowed to stand.*"

Dinick v. Schiedt
293 U. S. 474
55 S. Ct. R. 296

"Since the decision of Mr. Justice Story in 1822 this court has never expressed doubt in respect of the rule (denial of new trial conditioned on reduced verdict), and it has been uniformly applied by the lower federal courts."

(f) This Court will not reverse the State Courts on questions peculiarly within their discretion except on a clear showing that the State Courts have abused their discretion.

Washington Times v. Bonner
86 Fed. (2d) 836, ft. 848

"A trial judge who has heard comments of counsel and observed the jury at the time thereof is, from the practical standpoint, in a much better position than the appellate court to judge of their effect. Especially in a protracted trial, it is almost impossible not to have some things occur which might conceivably, as judged from a bare record, prejudice a jury. *The granting or denying of a new trial is discretion-*

ary with the trial judge, and only in cases of abuse may an appellate court disturb his ruling. We cannot say from the record in the instant case that the comments complained of must so plainly have prejudiced the jury that the trial judge abused his discretion in refusing a new trial."

Arkansas Valley Land & Cattle Company v. Mann

130 U. S. 69

9[illegible] S. Ct. R. 458

"Equally beyond our authority to review, upon a writ of error sued out by a party against whom a verdict is rendered, is an order overruling a motion for a new trial after the plaintiff, with leave of the court, has remitted a part of the verdict. Whether the verdict should be entirely set aside upon the ground that it was excessive, or was the result of prejudice, or of a reckless disregard of the evidence or of the instructions of the court, or whether the verdict should stand after being reduced to such amount as would relieve it of the imputation of being excessive, *are questions addressed to the discretion of the court and cannot be reviewed at the instance of the party in whose favor the reduction was made.*"

Gulf C. & S. F. Ry. Co. v. Curb

66 Fed. 519, at ft. 521

U. S. v. Mayer

235 U. S. 55

35 S. Ct. R. 16, top 20

Boehmer v. Penn. Ry. Co.

252 U. S. 496

40 S. Ct. R. 409

Gila Valley Etc. v. Hall

232 U. S. 94

34 S. Ct. R. 229

Fairmount Glass Works v. Cub Fork Coal Co.
287 U. S. 474
53 S. Ct. R. 252, at 255

> "The record before us does not contain any explanation by the trial court of the refusal to grant a new trial, or any interpretation by it of the jury's verdict. In the absence of such expressions by the trial court in the case at bar, the refusal to grant a new trial cannot be held erroneous as a matter of law. *Appellate courts should be slow to impute to juries a disregard of their duties, and to trial courts a want of diligence or perspicacity in appraising the jury's conduct.*"

(g) M. St. P. & S. St. M. Ry. Co. v. Moquin supports the judgment

Petitioner relies on *M. St. P. & S. St. M. Ry. Co. v. Moquin*, 283 U. S. 520, 51 S. Ct. R. 501. That case, properly understood, is not contrary to the decisions of the Supreme Court of Minnesota. In the Moquin case the Supreme Court of Minnesota found as a fact that "from the entire record before us *we are of the opinion that the verdict is excessive because of passion and prejudice.*"

In the instant case both the trial court and the Supreme Court of Minnesota found no passion or prejudice. The Supreme Sourt said:

> "In our opinion the original verdict of the jury was *not excessive.* Plaintiff's loss of earnings alone exceeded the amount which the jury allowed as damages * * * (1406). "The memorandum makes it clear that *the trial court found no passion or prejudice on the part of the jury and in this it was sustained by the record.* * * * *The record does not sustain a*

> *finding of passion and prejudice.* There was ample evidence upon which the jury could find for the amount which it did, *or for a larger sum.*" (R. 1411)

The Supreme Court of Minnesota fully considered the law as laid down by this court in the *Moquin* case and held:

> "The case is not controlled by Soo Line v. Moquin, supra, for there this court expressly found the existence of passion and prejudice. Here we find that *the trial court was right in concluding that there was no passion or prejudice.*" (R. 1413)

The cases cited by petitioner are all distinguishable on the ground pointed out by the Supreme Court of Minnesota.

(h) None of Petitioner's points, except the applicability of the Federal Statutes, presents a Federal question. They are, therefore, not reviewable in this court.

Chicago Junct. Ry. Co. v. King
222 U. S. 222
32 S. Ct. R. 79

was a case involving a defective coupler. The railway sought to have this court review many alleged errors. In refusing to consider them this court said:

> "Although we have jurisdiction to review, because the cause of action, as stated in the pleadings, rested upon the safety appliance law, *the questions now presented,* in a broad sense, *are of a character which ordinarily it was the purpose of the judiciary act* of 1891 (25 St. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 488) to submit to the final jurisdiction of the circuit court of appeals.

"Under the conditions just stated, *we do not think we are called upon to scrutinize the whole record* for the purpose of discovering whether it may not be possible, by a minute analysis of the evidence, to draw therefrom inferences which may possibly conflict with the conclusion of the courts below as to the tendencies of the proof."

M. St. P. & S. St. M. Ry. Co. v. Popplar
237 U. S. 369
35 S. Ct. R. 609

also involved a defective coupler. On error to the Supreme Court of Minnesota this court said:

"Our power to review the judgment is controlled by §237 of the Judicial Code (citing authorities). In the present case a Federal question could arise only under the safety appliance act; * * * *It is apparent that the ruling referred to does not involve the construction of the Federal statute or any right or immunity from liability which is thereby conferred.* * * * The Federal statute in the present case, touched the duty of the master at a single point, and, save as provided in the statute, the right of the plaintiff to recover was left to be determined by the law of the state."

Boehmer v. Penn. Ry. Co.
252 U. S. 496
40 S. Ct. R. 409

"The rule is well settled that in such circumstances where two courts have agreed, we will not enter upon a minute analysis of the evidence."

Fairport P. & E. R. Co. v. Meredith
292 U. S. 589, ft. 597
54 S. Ct. R. 826

VI.

CONCLUSION

1. The findings and judgments of the State Courts regarding the applicability and the violation of the Federal Statutes accord with applicable decisions of this Court.

2. All other questions presented by the petition are controlled by the laws and procedure of the State of Minnesota, or are within the discretion of the State Courts.

3. The record sustains the verdict and the judgments of the State Courts. There was no abuse of discretion by the courts below.

THEREFORE, the petition for the writ of certiorari should be denied.

Respectfully submitted,

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